PD-1039-20
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 3/5/2021 5:16 PM
Accepted 3/8/2021 9:07 AM
DEANA WILLIAMSON
CLERK

No. PD-1039-20

FILED
COURT OF CRIMINAL APPEALS
3/8/2021
DEANA WILLIAMSON, CLERK

In the
Court of Criminal Appeals of Texas
At Austin

No. 01-18-00139-CR
In the Court of Appeals
For the
First District of Texas
At Houston

No. 1412036-A
In the 176th District Court of
Harris County, Texas

EX PARTE OSCAR MINJARE SANCHEZ, JR.

Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S BRIEF DISCRETIONARY REVIEW

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ORAL ARGUMENT NOT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

When this Court granted the State's petition for discretionary review, it announced that oral argument would not be permitted.

IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.2(a)(1)(A) , a complete list of the names of all interested parties is provided below.

VICTIM:

Lieutenant Gaisile Goudau

COUNSEL FOR THE STATE:

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PRESIDING JUDGE:

Hon. Stacey Bond
176th District Court of Harris County, Texas

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

RULES

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

Appellant was charged with the felony offense of failing to stop and render aid (CR 15). Appellant entered a plea of not guilty, and the case proceeded to jury trial (CR 67). The jury found appellant guilty of the charged offense and assessed a ten-year probated sentence (CR 67). The court certified appellant's right to appeal, and appellant filed a timely notice of appeal (CR 73, 75).

STATEMENT OF FACTS

In the early morning hours of August 11, 2013, Lieutenant Gaisile Goudau—the complainant—was monitoring a police chase while driving in an unmarked Chevy Impala (3RR 25-29, 32-34). During the pursuit, the complainant pulled her vehicle to the right lane to allow a police cruiser to pass her (3RR 36-37). A few seconds after moving to the far-right lane, appellant's truck struck the complainant's vehicle from behind causing a violent collision (3RR 38). The complainant heard a loud crash at the time of impact and her vehicle was lifted into the air (3RR 38-39). As a result of the collision, the complainant's vehicle was pushed over the curb, through some pipes, and into a nearby parking lot (4RR 44, 50-51, 80-81m 122-24, 128). Appellant did not stop his vehicle after causing the collision (4RR 49).

The deputy, who passed the complainant several seconds before the crash, told the jury that he observed (through his rearview mirror) a truck—matching appellant's truck—strike the complainant's vehicle (4RR 44-49). He then saw the complainant's

vehicle rise into the air, hit the curb, and go over into the parking lot (4RR 44). He stated that the driver of the vehicle would have seen the complainant's car rise into the air and would have been aware of the collision (4RR 51). The State presented evidence that the collision caused the complainant's license plate to fall off her vehicle (4RR 121-28). In addition, the State presented evidence showing that paint from the rear of the complainant's vehicle was discovered on the tow ring located on the front of appellant's truck (5RR 157).

Appellant admitted to police that while he was driving his friend's home from a bar, he began following the same police chase that the complainant was monitoring (St. Ex. 43). One of his passengers—a Tomball police captain—had been calling into the Tomball police department to report the police chase (St. Ex. 43). Appellant admitted that he was driving at the time of the incident and claimed that the complainant had pulled in front of his vehicle (St. Ex. 43). However, he denied striking the complainant's vehicle and said that he swerved out of the way and avoided a collision (4RR 196-98). Appellant stated that there were four other people in the car with him on the night of the incident and acknowledged that he was the designated driver for the other four passengers (St. Ex. 43).

At trial, the jury learned that the four passengers had been interviewed by the police and that their statements had been recorded on video (4RR 153-54). The jury also heard that the four passengers' statements were consistent with one another and that they did not support the police's theory of the case (4RR 157, 170). In addition,

the jury learned that the witnesses' statements were consistent with appellant's statement, which was entered into evidence (4RR 157; 5RR 114; State's Ex. 43). As noted above, appellant's statement confirmed that he was driving close to the complainant's vehicle at the time of the accident but denied that a collision had taken place (St. Ex. 43). Appellant's trial attorney elected not to call the passengers to testify. Instead, he elicited information about their statements during cross-examination and argued at closing that the State failed to call these witnesses because their testimony would have conflicted with the State's theory that appellant caused the accident (6RR 16). After hearing all of the evidence, the jury returned a verdict of guilty and appellant was sentenced to 10 years of probation (6RR 35; CR 67).

After unsuccessfully appealing his conviction, appellant filed a writ of habeas corpus in which he claimed that his trial counsel's decision not to call Richard Grassi, Sharleen Martin, and Bobby Flores—three of the four passengers in appellant's truck on the night of the collision—amounted to ineffective assistance of counsel (CR 8-17). Judge Harmon—rather than Judge Stacy Bond who presided over the trial—reviewed appellant's writ application, the record and the submitted affidavits and subsequently denied appellant's writ application (CR 5-9; Supp. CR 25).

STATEMENT OF PROCEDURAL HISTORY

The appellate court affirmed appellant's conviction in Cause No. 01-16-00293-CR and subsequently issued a mandate. Appellant then filed a writ of habeas corpus alleging that his trial counsel had provided ineffective assistance of counsel at trial due

to his failure to call witnesses to testify. Appellant's writ was denied by the habeas court (CR 25). The habeas court certified appellant's right of appeal and appellant filed a timely notice of appeal (CR 44-45). The appellate court issued an opinion on December 18, 2018, affirming the habeas court's denial of the writ. Appellant's motion for rehearing was denied by operation of law but the en banc Court granted rehearing. After rehearing this matter, the appellate court withdrew its original opinion, vacated its judgment, declined to adopt the habeas judge's findings of fact and conclusions of law, reversed the habeas court's denial of relief and remanded the case for proceedings consistent with its opinion. *See Ex Parte Sanchez, Jr.*, No. 01-18-00139-CR, 2020 WL 1522817 (Tex. App.—Houston [1st Dist.] March 31, 2020, no pet. h.). The State's petition for discretionary review was due November 12, 2020. This Court granted the State's petition for discretionary review on February 3, 2021.

ISSUE PRESENTED

Did the First Court of Appeals err by acting as factfinder in appellant's 11.072 habeas proceeding? Unlike the Court of Criminal Appeals in an Article 11.07 writ, the 1st Court of Appeals' role in an Article 11.072 writ is purely that of an appellate court. Consequently, the question before the appellate court was not whether to accept or reject the trial court's findings, but whether the trial court abused its discretion in denying relief.

SUMMARY OF THE ARGUMENT

The intermediate appellate court erroneously acted as factfinder in appellant's appeal from the trial court's denial of his 11.072 writ of habeas corpus. In doing so,

the appellate court both overstepped its authority and failed to determine whether the trial court abused its discretion in denying relief.

ARGUMENT

The appellate court erred by declining to rule on the legal question before it—whether the trial court abused its discretion in determining that trial counsel was not constitutionally ineffective—and instead remanded the case for further factual development. In doing so, the court relied upon Article 11.07 habeas case law from the Court of Criminal Appeals. TEX. CODE CRIM. PROC. ANN. Art. 11.07. In Article 11.07 writs, the Court of Criminal Appeals is the ultimate finder of fact. *Ex parte Garcia*, 353 S.W.3d 785, 787-88 (Tex. Crim. App. 2011) *citing Ex parte Reed*, 271 S.W.3d 698, 727-28 (Tex. Crim. App. 2008). This is because the Texas constitution vests the Court of Criminal Appeals with authority to ascertain matters of fact in writ proceedings and the Texas Code of Criminal Procedure empowers the Court to grant writs of habeas corpus. TEX. CONST. ART. V §5; TEX. CODE CRIM. PROC. Art. 11.05. While the Court of Criminal Appeals usually defers to the trial court's findings of fact in Article 11.07 writs, as the ultimate fact finder, it has the power to make findings and conclusions that the record supports. *Ex parte Garcia*, 353 S.W.3d at 787-88.

By contrast, intermediate appellate courts do not have the ability to act as fact finders in 11.072 writ proceedings. *See* TEX. CODE CRIM. PROC. ANN. Art. 11.072; *see also Ex parte Torres*, 483 S.W.3d 35, 42 (Tex. Crim. App. 2016) (in article 11.072 habeas

proceedings the trial judge is the sole finder of fact). Consequently, an intermediate court's only role in 11.072 appeals is to act as an appellate court. *See Ex parte Garcia*, 353 S.W.3d at 788 (intermediate courts of appeals are truly appellate courts in the article 11.072 context). For this reason, intermediate appellate courts do not have the authority to ascertain matters of fact in writ proceedings. *See State v. Guerrero*, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013) (in a post-conviction writ application filed pursuant to Article 11.072, the trial judge is the sole finder of fact). Also, unlike the Court of Criminal Appeals, intermediate appellate courts are not vested with the power to grant habeas corpus relief. *See* TEX. CODE CRIM. PROC. Art. 11.05.

In addition to incorrectly applying Court of Criminal Appeals 11.07 precedent, the intermediate appellate court also cited *Ex parte Zantos-Cuebas* to support its decision to remand appellant's case for further fact finding. 429 S.W.3d 83 (Tex. App.—Houston [1st Dist.] 2014, no pet.). While *Ex parte Zantos-Ceubas* does involve an 11.072 writ that was remanded for fact finding by an intermediate appellate court, in that case—unlike appellant's—no findings of fact had been made at the time the Court remanded for factual findings. *See Id.* at 88 ("In this case, the trial court entered a written order denying the application as frivolous and did not enter written findings of fact or conclusions of law."). The appellate court in *Ex parte Zantos-Cuebas* remanded the case for a first round of findings; not a second round of findings. Consequently, this case

does not support the appellate court's decision to remand for a second round of findings.

In summary, unlike the Court of Criminal Appeals in an Article 11.07 writ, an intermediate appellate court's role in an appeal from an 11.072 writ is solely that of an appellate court. Given that the appellate court is not the finder of fact in an 11.072 writ, the appellate court erred by declining to adopt the trial judge's findings of fact and conclusions of law. The State can find no precedent for an intermediate court framing its appellate review of an 11.072 case in terms of whether to adopt the trial court's findings. This lack of precedent is further indication that the appellate court's sole role in appellant's appeal was to determine whether the habeas court abused its discretion by denying appellant's ineffective assistance of counsel claim. *See Riley v. State*, 378 S.W.3d 453, 457-58 (Tex. Crim. App. 2012) *overruled on other grounds by Miller v. State*, 548 S.W.3d 497 (Tex. Crim. App. 2018) (because claims of ineffective assistance of counsel involve mixed questions of law and fact, an appellate court should apply an abuse of discretion standard on appeal).

To prevail on his ineffective-assistance claim, appellant was required to provide an appellate record that demonstrates that his counsel's performance was not based on sound strategy. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (holding that record must affirmatively demonstrate alleged ineffectiveness). The appellate court has already acknowledged that the record contains "no information about trial strategy." *Ex Parte Sanchez, Jr.*, 2020 WL 1522817 at *20. When the record is silent regarding trial

strategy, a defendant is only entitled to relief if he can show that no reasonable attorney could have made the trial decisions that were made. *Weaver v. State*, 265 S.W.3d 523, 538 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). By acknowledging that, "there may be reasonable trial strategies that counsel against putting into evidence even helpful testimony" the appellate court has already determined that appellant failed to meet this burden to show that his trial counsel's decision not to call the witnesses constituted ineffective assistance of counsel. *Ex Parte Sanchez, Jr.*, 2020 WL 1522817 at *17. This conclusion requires the appellate court to affirm the habeas court's denial of relief. *See Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Consequently, the State requests that this Court overturn the appellate court's decision to remand for a second round of fact finding and instruct the appellate court to determine whether the habeas court abused its discretion in denying relief.

PRAYER FOR RELIEF

The State prays that the court of appeals be instructed to retract their order for additional factual findings and determine whether the habeas court abused its discretion in denying relief.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies in compliance with Texas Rule of Appellate Procedure 9.4(i)(3) that the foregoing petition for discretion review contains 2,785 words, as represented by the word-processing program used to create the document. This document complies with the typeface requirements in Rule 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in a 12-point typeface.

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